COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1570

WAYNE A. DAVIS, petitioner.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In 1988, Wayne A. Davis (petitioner) was committed to the Massachusetts Treatment Center (treatment center) as a "sexually dangerous person," pursuant to G. L. c. 123A, § 1,[1] for an indefinite period of from one day to his natural life. In 2013, the petitioner filed a petition for examination and discharge pursuant to G. L. c. 123A, § 9, seeking discharge from his civil commitment. This appeal stems from a subsequent jury verdict finding that the Commonwealth had proved beyond a reasonable doubt that the petitioner remained a sexually dangerous person. On appeal, the petitioner primarily argues that the judge

[1] General Laws c. 123A, § 1, defines "[s]exually dangerous person," in part, as "any person who has been . . . previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of 16 years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires."

improperly admitted in evidence unsubstantiated hearsay allegations that, as an adolescent, the petitioner had sexually assaulted numerous neighborhood children. We affirm.

Background. We recite the facts the jury could have found, and reserve additional facts for the discussion of particular issues below. In 1986, the petitioner was convicted of two counts of indecent assault and battery on a child under the age of fourteen, pursuant to G. L. c. 265, § 13B, and one count of open and gross lewdness and lascivious behavior, pursuant to G. L. c. 272, § 16. One of the indecent assault and battery counts was committed by the petitioner in 1984 against a nine year old boy, and the other count, as well as the open and gross lewdness count, was committed by the petitioner in 1985 against a nine year old girl. The petitioner was seventeen and eighteen years old when he committed the respective crimes. The petitioner had, since the early 1980s, been a resident at various group homes and institutional settings, to address academic struggles and for exhibiting sexually inappropriate behavior in public.

During the trial pursuant to G. L. c. 123A, § 9, in 2017, three expert witnesses for the Commonwealth, including two qualified examiners[2] and one expert psychologist member of the

[2] Greg Belle, Ph.D., and Katrin Rouse-Weird, Ed.D.

community access board (CAB),[3] opined that the petitioner remained a sexually dangerous person. All three experts submitted to the court reports, which were entered in evidence without objection, that quoted the Commonwealth's sentencing memorandum[4] for the underlying convictions, stating the petitioner "was arrested in the Spring of 1984 for a number of sexual assaults and exposures upon other children in the apartment complex." Numerous CAB reports that chronicled the petitioner's history in civil commitment and contained admissions by the petitioner of other offenses[5] that did not result in criminal charges,[6] were referenced by each expert in their reports. The reports by the experts also detailed the petitioner's history, spanning several decades, of rule-breaking and sexual misconduct while at the treatment center, which included inappropriately touching himself and other residents, possessing pornographic materials involving children, engaging in sexual activity with other residents, and admitting to "the

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[3] Angela Johnson, Psy.D.

[4] The actual sentencing memorandum was not entered in evidence and is not part of the appellate record.

[5] The 2011 CAB annual review includes admissions by the petitioner that he had molested a nine year old boy every week for one year when he was thirteen, and that he had molested a fourteen year old boy when he was sixteen.

[6] At the hearing on the motion in limine regarding uncharged conduct, both parties agreed, although for differing reasons, that the petitioner's own admissions regarding such uncharged conduct would be admissible at trial.

grooming of younger male inmates with the hope of getting them to allow him sexual access."

Discussion. The petitioner argues that the judge improperly admitted in evidence unsubstantiated hearsay allegations regarding uncharged offenses he had committed against numerous other neighborhood children. Specifically, during his testimony, Dr. Belle referenced information derived from the Commonwealth's underlying sentencing memorandum, including that the mother of one of the victims learned that the petitioner had been arrested for exposing himself to other children within the apartment complex, causing her to ask the victim if he had been sexually assaulted by the defendant. Although the petitioner made a late objection to the testimony, the parties agree that the issue was preserved and that we should review for prejudicial error. See Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 445 (1983), quoting Kotteakos v. United States, 328 U.S. 750, 764-765 (1946). An error is nonprejudicial where it "did not influence the jury, or had but very slight effect." Commonwealth v. Reyes, 464 Mass. 245, 260 (2013), quoting Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994). We discern no error here.

In a trial pursuant to a petition for examination and discharge under G. L. c. 123A, § 9, either party may introduce in evidence "the [petitioner's] juvenile and adult court and

probation records, psychiatric and psychological records, the department of correction's updated annual progress report of the petition, . . . and any other evidence that tends to indicate that [the petitioner] is a sexually dangerous person." See G. L. c. 123A, § 14 (c) ("police reports relating to [the petitioner's] prior sexual offenses . . . and any other evidence tending to show that [the petitioner] is or is not a sexually dangerous person shall be admissible at the trial"). Additionally, statements made by the petitioner are admissible under our standard evidentiary rules. See McHoul, petitioner, 445 Mass. 143, 148 n.3 (2005); Mass. G. Evid. § 801(d)(2)(A) (2019).

Here, it was appropriate for Dr. Belle (and the other expert witnesses) to rely on and testify to the information contained within documents admissible under the statutory framework as well as the petitioner's own admissions,[7] to inform his analysis of the defendant's current status as a sexually dangerous person. See Commonwealth v. Given, 441 Mass. 741, 745 (2004). In Given, the court held that "other information in

[7] The petitioner referenced uncharged criminal conduct included in his 2010 CAB annual review where he had disclosed, "There were a few . . . boys . . . aged 8 or 9 or 10 . . . . I had them sit on my lap and fondled them through their pants." He referenced further uncharged criminal conduct included in the 2011 CAB annual review. See note 5, supra.

police reports -- including any statements describing the defendant's conduct and the circumstances attendant to the offense -- is also admissible" and that the "fact that that information could have, but did not, result in additional criminal charges is irrelevant to its admissibility under § 14 (c)." Id. It is significant, moreover, that the references contained within the Commonwealth's sentencing memorandum, to which the defendant objects, were quoted in the reports of all three experts at trial, the redacted versions of which were approved by both parties prior to trial and admitted in evidence.[8] Thus, there was no error.[9]

The petitioner next argues, for the first time on appeal, that the use of the terms "child molester" and "institutionalized" by counsel for the Commonwealth was

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[8] "[E]xperts want those surrounding details that may provide clues, going beyond the mere fact of the commission of a sexual offense, that indicate mental abnormality or future dangerousness . . . . Those surrounding details may include other offenses . . . , either against the victim of the sexual assault or against another victim . . . . Section 14 (c) ensures that those details are made available to the experts and fact finder alike." Given, 441 Mass. at 745 n.5.

[9] Even if it were error, it did not have more than a "slight effect" on the jury given the totality of the evidence against the petitioner (quotation omitted). Reyes, 464 Mass. at 260. The petitioner also argues that the judge's instructions to the jury impermissibly invited the jury to consider the facts underlying the uncharged conduct. This argument is without merit. The judge properly gave a standard instruction defining compulsive or repetitive sexual misconduct and we presume the jury followed the instruction. See Wyatt, petitioner, 428 Mass. 347, 359 (1999).

improper. Because this issue was not preserved, we review for a substantial risk of a miscarriage of justice. See Commonwealth v. Proulx, 61 Mass. App. Ct. 454, 461 (2004). The evidence before the jury demonstrated that the petitioner had been convicted of sexually assaulting two children when he was a young adult, that he had committed other uncharged offenses against children around that time, and that he had been cited for behaving in a sexually inappropriate way dozens of times while he was civilly committed at various group homes and medical establishments since he was a teenager. Counsel for the Commonwealth described the petitioner as a "child molester" once in her opening statement and both parties described his having been "institutionalized" since adolescence. We determine that, based on the record, the use of both descriptive terms was not error, and thus conclude that there was no substantial risk of a miscarriage of justice.

Finally, the petitioner argues that the judge erred when she declined to instruct the jury that "participation in the Community Transition House was not a precondition to a finding that he was no longer sexually dangerous," and instead allowed the parties to argue the merits of the issue, resulting in burden shifting. We review for prejudicial error. See Peruzzi, 15 Mass. App. Ct. at 445. In this case, the petitioner opened the door to Dr. Belle's testimony and other evidence relating to

the different treatment options available by saying that he had "reached the highest form of treatment" in his opening statement. Thus, the Commonwealth was entitled to offer evidence about the community transition house, which it did through direct examination of Dr. Belle, who properly explained that being in that program was the most advanced form of treatment because it gave inmates the most autonomy. Additionally, there was evidence that the petitioner chose not to be in the community transition house because he did not want to be "strip-searched." The judge properly instructed the jury not to consider the adequacy or effectiveness of the program at the treatment center and, because the petitioner opened the door to the issue, did not err in allowing Dr. Belle's testimony regarding the community transition house. See Wyatt, petitioner, 428 Mass. 347, 357-358 (1998).

Judgment affirmed.

By the Court (Green, C.J.
Agnes & Desmond, JJ.[10]),

Joseph F. Stanton

Clerk

Entered: July 24, 2019.

[10] The panelists are listed in order of seniority.